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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0865**

Angela Proper,  
Relator,

vs.

Department of Employment and Economic Development,  
Respondent.

**Filed March 11, 2013  
Affirmed in part and remanded  
Ross, Judge**

Department of Employment and Economic Development  
File No. 29132414-3

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(for relator)

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Development, St. Paul, Minnesota (for respondent Department)

Considered and decided by Kirk, Presiding Judge; Ross, Judge; and Schellhas,  
Judge.

**UNPUBLISHED OPINION**

**ROSS, Judge**

In this certiorari appeal, relator Angela Proper challenges the decision of the  
unemployment law judge (ULJ) that she was not available for suitable employment while  
she was collecting unemployment benefits and was therefore ineligible for the benefits

and must repay them. Because substantial evidence supports the ULJ's finding that Proper was not available for suitable employment, we affirm the overpayment determination. But because the ULJ failed to specify his rationale behind the overpayment calculation, we remand for the ULJ to enter the necessary findings.

## **FACTS**

Angela Proper began receiving weekly unemployment benefits of \$585 after she was terminated from her position as a business analyst in June 2010. She believes that her inability to meet her employer's expectations resulted from medical problems that hindered her ability to focus, concentrate, sleep, and recall details. She moved to New Hampshire in August 2010.

Proper was not under a physician's care between her termination and her move, but she believed that she had adjusted to medication and could concentrate and work. So she applied for work. In May 2011 she began seeing a psychiatrist and in July 2011, she found work as a cashier. But her new employment ended in September 2011 because she again found it difficult to focus. Soon she found another cashiering position, which she maintained for several months.

In August 2011, Proper's psychiatrist helped her file for social security disability benefits. Based on Proper's submissions, the Social Security Administration determined that Proper became disabled in June 2010 and awarded her benefits retroactively beginning in December 2010. Proper contacted Minnesota's unemployment office in light of her having collected both unemployment benefits and disability benefits in part

for the same period. According to Proper, the unemployment office staff worker directed her to continue collecting unemployment benefits while the office investigated.

The unemployment office investigated Proper's receipt of both unemployment benefits and social security disability benefits. The Minnesota Department of Employment and Economic Development then determined that Proper was ineligible for unemployment benefits from June 22, 2010, to September 1, 2011, because she was unable to work. It concluded that Proper must repay the unemployment benefits she received for that period.

Proper appealed administratively, and, after an evidentiary hearing, the ULJ also determined that Proper was not available for suitable employment between June 22, 2010, and August 31, 2011. The ULJ found that Proper had received social security disability benefits beginning after December 2010, and, based on statutorily defined calculations, must repay \$27,354 in overpaid unemployment benefits. Proper requested reconsideration and the ULJ affirmed.

This certiorari appeal follows.

## **D E C I S I O N**

Proper challenges the ULJ's decision that she was overpaid unemployment benefits. On review of a ULJ's decision, we may affirm, remand for further proceedings, or reverse or modify the decision if substantial rights have been prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2012). Proper contends that substantial evidence does not support the ULJ's decision. Substantial evidence is

“(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). We review the ULJ’s findings of fact in the light most favorable to the decision and will rely on them if they are supported by substantial evidence. *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 31 (Minn. App. 2012). But a ULJ’s determination of ineligibility is a question of law reviewed de novo. *Id.* at 30.

## I

Proper argues that the ULJ erred by determining that she was ineligible for unemployment benefits after he found that she was not available for suitable employment between June 2010 and September 2011. An applicant can receive unemployment benefits only if she satisfies all eligibility requirements listed in Minnesota Statutes section 268.085, subdivision 1, including being “available for suitable employment.” Minn. Stat. § 268.085, subd. 1(4) (2010). Available for suitable employment means that the applicant is “ready and willing” to accept employment. *Id.*, subd. 15(a). Whether an applicant is available for suitable employment is a question of fact. *Semanko v. Dep’t of Emp’t Servs.*, 309 Minn. 425, 428, 244 N.W.2d 663, 665 (1976).

Proper conceded through counsel at oral argument on appeal that a reasonable person could find from the evidence that she was not available for work between June 2010 and September 2011. The evidence supports the concession. Proper and her psychiatrist submitted medical documents during the investigation. Proper’s psychiatrist

provided a statement that Proper was totally unable to perform any type of work from June 2010 to September 2011. The psychiatrist partially qualified her statement in a follow-up letter:

I did not examine Ms. Proper prior to May 2011, but I did obtain history from Ms. Proper that she stopped working in June 2010, and that she continued to have symptoms up until our meeting in May 2011. As I did not evaluate Ms. Proper prior to May 2011, I do not know how severe her symptoms were, or if they were impacting her ability to work or to find employment. From her history, I suspect she was unable to work, but again, I did not evaluate her during that time period so I cannot be entirely certain.

Based on the psychiatrist's statement and follow-up letter, substantial evidence would allow a fact finder to conclude that the psychiatrist relied on personal examination beginning in May 2011 and on information from Proper to find that Proper was unable to work from June 2010 to September 2011. A fact-finder would not necessarily reject the psychiatrist's opinion simply because that inability period included 11 months before she began seeing Proper. The evidence was that the psychiatrist knew that Proper was unable to work based on her personal observations in May and that she reasonably suspected that the inability period began 11 months before. Proper herself submitted a statement that she was not available for employment between June 2010 and September 2011.

The concession at oral argument and, more so, the supporting facts, lead us to reject Proper's briefed argument that we should not credit her psychiatrist's statement based on the qualifying follow-up letter. The ULJ recognized that Proper's psychiatrist did not examine her until May 2011, but he found that "the [psychiatrist's] educated suspicions, coupled with Proper's inability to concentrate and focus at [her first cashier

job in New Hampshire],” constituted “sufficient evidence to show that Proper may have been willing to work between June 2010 and September 1, 2011, but she was not ready to work during this period.” The ULJ surmised that “Proper’s [psychiatrist]—who helped Proper file for disability benefits in August 2011—reviewed Proper’s medical history and suspect[ed] that Proper was not able to work after June 2011.” On reconsideration, the ULJ reiterated that he found the psychiatrist’s “informed opinion regarding Proper’s work ability to be more likely than Proper’s statements to the contrary” and again emphasized that the psychiatrist based her opinion on a review of both Proper’s history and her personal interaction with Proper. In light of these fully explained credibility determinations, we hold that substantial evidence supports the ULJ’s determination that Proper was not available for suitable employment, that she was ineligible for unemployment benefits, and that she is required to repay benefits received between June 2010 and September 2011.

## II

Proper raised several alternative theories in her brief and at oral argument, contending that even if she was unable to work beginning in June 2010, her receipt of social security benefits beginning in December 2010 should not affect the unemployment benefits that she received between June 2010 and September 2011. An applicant who receives, has received, or has filed for social security disability benefits for any week during the benefit year is not available for suitable employment for that week unless an exception applies. Minn. Stat. § 268.085, subd. 4(c). The only exception that might apply in this case is if the applicant provides a statement certifying that she is available for

suitable employment from an appropriate health care professional who is aware of the applicant's disability claim and the basis for it. *See id.*, subd. 4(c)(2). If she meets this exception, the applicant's weekly unemployment benefits are subject to a fifty-percent deduction of the weekly equivalent of her social security disability benefits. *Id.* Proper appears to contend that because her psychiatrist's follow-up letter does not explicitly indicate her unavailability, she must be deemed available. But the statute requires a health care professional's letter certifying that the relator *is available* for suitable employment. The psychiatrist's letter does not qualify.

Proper also appears to offer two additional arguments for her eligibility to receive unemployment benefits: (1) because she did not receive social security disability benefits between June and December 2010, she is eligible for unemployment benefits despite being unavailable to work; and (2) even if she was not available to work for purposes of unemployment benefits and received social security disability benefits, the only consequence is a fifty-percent deduction rather than total ineligibility. She relies heavily but mistakenly on *Huston v. Comm'r of Emp't & Econ. Dev.*, 672 N.W.2d 606 (Minn. App. 2003), *review granted* (Minn. Feb. 25, 2004), *appeal dismissed* (Minn. May 25, 2004).

The applicable statute and *Huston* defeat Proper's arguments. An applicant who does not meet all of the statutorily defined requirements, such as being available for suitable employment, is ineligible for unemployment benefits. *See* Minn. Stat. § 268.085, subd. 1. And an applicant who is eligible for unemployment benefits and who receives social security disability benefits is subject to a reduction of her unemployment benefits

in the amount of fifty percent of her weekly social security benefits. *Id.*, subd. 4(c). *Huston* does not change this requirement or the consequence of not meeting it. In that case, we held that a prior version of section 268.085 violated the Americans with Disabilities Act. 682 N.W.2d at 611. We did not consider whether the relator was available for suitable employment, and the relator there, unlike Proper, was at all times “ready and able to work.” *Id.* at 610. Proper’s arguments find no support in *Huston*.

### III

The ULJ determined that Proper was overpaid \$26,769 in unemployment benefits. But he did not indicate how he arrived at this figure. We therefore cannot say either that the ULJ’s specific calculation is supported by substantial evidence or that it is not. The department concedes that a remand is necessary for the ULJ to reveal the basis for the calculation. We remand for further review of the record by the ULJ to provide the rationale for calculating the overpayment amount.

**Affirmed in part and remanded.**